A Fierce Advocate for Just Compensation

An Interview with Gideon Kanner

BY BARBARA BILLITZER

For over four decades, Gideon Kanner has been a relentless opponent of the abuse of eminent domain law.

Long considered a go-to spokesperson in all matters relating to eminent domain and inverse condemnation, Gideon has been a practicing appellate lawyer for over 40 years. He is a Professor of Law Emeritus at Loyola Law School in Los Angeles, and he is listed in Best Lawyers in America. He appeared in cases before the U.S. Supreme Court and served as counsel for property owners in a number of precedent-setting eminent domain cases before the California Supreme Court. Gideon has also been a consultant to the California Law Revision Commission for over 30 years, affecting statutory law when he advocated to make business goodwill compensable, which the Legislature did in 1976.

A prolific writer, speaker and author, Gideon began publishing Just Compensation, a monthly periodical on the law of eminent domain, in 1974. After being approached by the publisher, Gideon granted Right of Way Magazine permission to reprint selected excerpts. His case summaries had a "tell it like it is" style, and his side notes read like punch lines to a good joke. That may be why IRWA members have consistently ranked Just Compensation as one of their favorite sections of the magazine.

Gideon recently decided to cease publishing his monthly periodical. So while this popular section of the magazine will surely be missed, his blog—Gideon's Trumpet—offers a daily dose of witty banter on current events and is an admirable substitute.

In acknowledging his vital contributions on behalf of eminent domain law, we asked Gideon to share his insight on emerging issues and some highlights from his illustrious career as the industry's most vocal advocate.

What led you to become interested in inverse condemnation and eminent domain law?

Becoming a condemnation lawyer was more or less accidental. I never heard of eminent domain in law school. But in my misspent youth I was a rocket engineer, and in the 1960s, my employer assigned me to Washington, D.C. While there, I met a visiting California lawyer named Jerry Fadem who was practicing eminent domain law. When Jerry learned that I was a lawyer who had been admitted to the California bar, he made me an offer I couldn't refuse – economically speaking. So I accepted and moved back to California to practice law with him. Eventually, our firm became known as Fadem & Kanner. The rest is history.

What do you see as some emerging issues in real estate law?

I'm a fan of Yogi Berra, who was right when he said, "Prediction is very difficult; especially about the future." Still, this much seems clear - for the past century or so, the United States has been in the throes of an ideological war being waged against the American people's traditional property rights. In the 1970s, it took the form of a campaign to replace American constitutional law of property with something akin to the British Land and Country Planning Act of 1947, adopted by Clement Atlee's Socialist government. That legislation abolished the right to put privately-owned land to new uses without government "planning permission." To gain insight into the American effort to duplicate it, read Gladwin Hill, *Authority to Develop Land Is Termed a Public Right,* N.Y. Times,

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May 20, 1973, at p. 1, "A federal task force in land use said today that henceforth 'development rights' on private property must be regarded as resting with the community rather than with property owners." The U.S. Supreme Court wouldn't buy that, but the battle goes on.

In acquisition projects, what role should lawyers play?

Lawyers—particularly on the owners' side—should play an active role from the beginning. Eminent domain is full of myths and popular misunderstandings, and of course, private property owners are ignorant of the legalities of it. The law of eminent domain is supposed to take private property for "public use" upon payment of "just compensation." But in fact, the use need not be public and the compensation is not just, as conceded by the very courts that administer it in the name of "fairness." So lay people are in need of sound guidance as they navigate this unfamiliar territory.

Most people speak to a lawyer only after they get an offer from a right of way agent or are served with summons and complaint. This is not entirely unique to eminent domain; it is common that people do not understand their rights, and think that "you can't fight city hall." But you can, certainly when it comes to compensation, as demonstrated by studies done in California, Utah, Minnesota and Georgia, as well as by congressional hearings conducted in the 1960s, when gross undercompensation was rampant.

What can you share about your courtroom experiences?

From my visits to the appellate courts, I learned that although appellate judges are revered, and rightly so given their role in society, in reality, when it comes to highly specialized fields like eminent domain, they really don't know all that much, and why should they? Most of their time is taken up with cases involving criminal law, torts and insurance, and other subjects. Not many eminent domain cases. Particularly in recent years, you can count eminent domain cases decided on the merits by the California Supreme Court on the fingers of one hand, so the Justices don't get much practice, which alas has been notorious for

being criticized (from both sides) as harsh, inconsistent and confused. Or as the late Justice Roy Gustafson once put it, "a hopeless mess." What that means is that counsel appearing before the appellate courts for property owners (government counsel are coddled by judges) have a difficult and delicate task on their hands.

Fortunately, oral arguments are not very important in the decision-making process. It's the briefs that usually carry (or lose) the day, as noted by such diverse judicial personalities as U. S. Supreme Court Justices Clarence Thomas and Elena Kagan. This means that if you want to be an appellate lawyer, you have to be a good writer.

If you represent a property owner in an eminent domain case, particularly an inverse condemnation one, you must understand that your client is persona non grata or the law's "poor relation," as U.S. Supreme Court Chief Justice William Rehnquist once said. The California Supreme Court once stated in an opinion that it was its duty to keep condemnation awards down, which is a hell of a hurdle to overcome when your task is to persuade the Justices that your client was undercompensated by the court below. So in those not-so-good ol' days of the 1960s, when I walked into court, I had my job cut out for me. Sometimes, the hostility emanating from the bench was palpable. As Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the 9th Circuit once noted, what property owners in this field often get from the bench is "thinly-disguised contempt." This is not a line of work for the faint of heart.

Contrary to conventional wisdom, for an experienced appellate lawyer, arguing before the U.S. Supreme Court is not all that much different than arguing before the state supreme court. You just mustn't let all the ceremonial, historical schmaltz get in your way. The only real difference is in oral argument. Supreme Court Justices have bigger egos, so they tend to interrupt counsel (and each other) a lot more, and they do so irrespective of whether or not they have something to contribute to the discourse. For example, in the Obamacare case, Solicitor General Donald G. Verrilli was interrupted by the Justices 180 times, on average once every 22 seconds. Draw your own conclusion as to how helpful that Tower of Babble was to the resolution of the case.

As late Professor Paul M. Bator once put it, the U.S. Supreme Court has an unfortunate tendency to pay insufficient attention to the needs of primary consumers of its output. Instead of receiving clear guidance from above, lower court judges and lawyers are at times subjected to sometimes incomprehensible multi-part balancing tests that make outcomes indeterminable. For example, in *Penn Central Transportation Co. v. New York City*, the court allowed that it had been "simply unable" to formulate a statement of a cause of action in inverse condemnation cases. Think about it, all those bright Justices and their brilliant Ivy League clerks are unable to state that cause of action in the controversy before them, but you, you are required to do so to their satisfaction every time you file an inverse condemnation lawsuit, or suffer dismissal of your client's case. To say nothing of the "ripeness mess" in which no one can tell going in whether the case has been filed too early or too late. The courts have been known to hold that a property owner's case was filed both too early and too late.

My advice is to avoid humor. Getting off a witticism may be tempting, but there is nothing as pathetic as a lawyer who makes a joke in oral argument and nobody laughs. In my 40 years "up there," I made exactly two jokes – one in a case I couldn't possibly win, and one in a case I couldn't possibly lose. As the late, lamented California Supreme Court Justice Otto Kaus put it, "There is a division of labor here. We tell the jokes – you laugh."

Tell us about consulting with the Japanese Construction Ministry in reforming Japan's expropriation law.

Japan. That, folks, is another planet. Eminent domain is rarely used there because it is alien to the Japanese culture. Things tend to be done by consensus. And you don't push people around because if you do, they may push back. In the 1950s the Japanese government took farmland for the Narita Airport, but to this day there are occasional riots by descendants of the farmers whose land was taken, protesting the expropriation of their ancestral land. So unlike in the United States, even if you represent the condemnor, you have to be polite and patient in negotiating government land acquisitions with landowners.

Gideon receiving the Harrison Tweed Award for outstanding merit in Continuing Legal Education from the late Charles Alan Wright, then-President of the American Law Institute.

I have in my library a Japanese book, printed in English, believe it or not, in that Japanese comic book style, which is 128 pages long. What it is, however, is a Japanese right of way manual, entitled "Process of Land Acquisition and Compensation," published by the Hanshin Expressway Compensation Center, of Osaka. To an American condemnation lawyer, it's a trip, as the hippies used to say.

When planning an expressway, those folks send a team of two right of way agents into the targeted town – a senior, experienced one and a comparative novice. They move into town, become acquainted with local government officials and prominent citizens, and stay there for however long it takes, slowly and patiently persuading the landowners and business people in the path of the project to sell their properties voluntarily. Business people? Yes. Business losses are compensable in Japan. Compensation is for the real property and for "the amount [of] loss due to shutdowns, and loss of customers."

You've given hundreds of lectures and speeches over the years. When did it all start?

It all began in 1970 when I attended a Continuing Legal Education (CLE) program on eminent domain in Las Vegas. One of the speakers, the late Julius Sackman, author of Nichols on Eminent Domain, had read my article on goodwill, spotted me in the audience, and invited me to come up on the stage and join the speakers. I did. I was invited to come back to future programs, and . . . well, here I am, 43 years later, still at it. Our next program will be in New Orleans in January 2014. Y'all should come. If nothing else, the food should be good.

My most memorable presentation was the first one. It set me on a new professional path as a CLE lecturer. In 1969, I wrote my first law review article entitled, *When Is "Property" Not "Property Itself:" A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 Cal. Western Law Review 57 (1969). It was quite successful. It was reprinted in other publications a couple of times, and it became the cornerstone of my eventually successful effort to persuade the California Law Revision Commission to recommend a change in statutory law to make lost business goodwill compensable - which the Legislature did in 1976 on the Commission's recommendation (see Cal. Code Civ. Procedure § 1263.510).

What do you foresee as the outcome of the Richmond, California eminent domain case?

I am not a prophet, but it seems to me that however the courts rule on the right to take deeds of trust (which is all the commentators seem to be interested in), Richmond is going to take it in the chops on valuation. This is the first time I have seen a would-be private condemnor with the chutzpa to assert up front that it means to acquire property by eminent domain below its fair market value, and pocket the difference, ignoring the fact that in California fair market value is statutorily defined as the highest price that a willing buyer would pay to a willing seller in an arm's length, free market transaction.

Also, the Richmond folks do not seem to understand that in these cases there are three, not two parties – the condemnor, the condemnee and the holder of the bond that is secured by a bundle of trust deeds. If the condemnor takes some of the deeds of trust securing the bond, that will reduce the remaining value of the bond, thus giving rise to severance damages to the bonds that have now lost a part of their security. Besides, the U.S. Supreme Court has held in *New York Trust Co. v. New Jersey* that impairment of security for bonds is a constitutional violation.

What would you say is your greatest achievement?

My proudest achievement was that I single-handedly effected significant changes in the sometimes barbaric law of eminent domain, which is a tribute, not to me but to the American legal system's capacity to improve itself. To borrow Lewis Orgel's expression, you could say that all I did was to light a candle in the "dark corner of the law."

What's next for Gideon?

Who knows? I have my blog at www.gideonstrumpet.info, I still lecture in a couple of American Law Institute CLE programs and I write. My next law review article (on the fall of Detroit and the decline of urban America) is being edited now by the editors of a law journal. Stay tuned. ✪